PENGURUSAN DANAHARTA NASIONAL BHD A

v.

ASTRON LTD

HIGH COURT MALAYA, KUALA LUMPUR B
ABDUL WAHAB PATAIL J
[ORIGINATING SUMMONS NO: 24-2925-2002]
11 OCTOBER 2007

LAND LAW: *Caveat - Private caveat - Application for removal by Pengurusan Danaharta Nasional Sdn Bhd ('Danaharta') - Whether Danaharta an aggrieved party - Whether Danaharta estopped from seeking removal of caveat under s. 327 National Land Code having failed in application under s. 326 of same - Whether caveator had a caveatable interest - Whether Danaharta had a right ad rem obtained earlier than interest of caveator* C D

The plaintiff, Pengurusan Danaharta Nasional Sdn Bhd ('Danaharta') applied to remove a private caveat lodged by the defendant company, Astron Ltd ('Astron') on a piece of land in Port Dickson. The facts showed that the said land was mortgaged by Port Dickson Land Development Sdn Bhd to MBf Finance Bhd to secure a RM19.6 million loan to Sena Maju Sdn Bhd. All rights to the charge were then transferred to Danaharta free of encrumbrances and claims. Danaharta demanded repayment from Sena Maju Sdn Bhd and Port Dickson Land Development Sdn Bhd. In default of repayment, Danaharta exercised its right under s. 57 of the Pengurusan Danaharta Nasional Berhad Act 1998 ('the Act') to sell the said land to a third party. It was then found that Astron had filed the private caveat. Astron was an Australian public company involved in the restructuring of the Safuan Group of Companies ('Safuan Group'). As part of the exercise, several properties were bought including the said land in question. Astron was to inject RM10 million into the Safuan Group. Part of that sum was to repay MBf. However, the restructuring exercise failed. Astron then commenced civil proceedings for specific performance and declaratory relief against the Safuan Group, including performance of the sale of the land to Astron by way of a civil suit C5-22-218-1997. Danaharta sought removal of the caveat under s. 326 of the National Land Code ('NLC'). However, Astron obtained an extension of two months. Danaharta then filed this application for the removal/cancellation of the caveat. E F G H I

Held (allowing the plaintiff's application):

(1) Danaharta was not and had not been made a party to the civil suit in C5-22-218-1997, an action by Astron subsequent to the failed restructuring exercise for Safuan Group. In not naming Danaharta as a defendant, Astron conceded that Danaharta was not a relevant party in that action. In such event, a party not named retains the right whether to apply to intervene in that action or to commence and maintain its own action separately. (para 11)

(2) The argument that Danaharta could not be an aggrieved party because the charge was illegal *ab initio* was of no merit as it was circular reasoning to apply it to the status of Danaharta as a party. The argument on legality of the charge was a separate issue. (para 12)

(3) The caveat by Astron prevented Danaharta from proceeding with its statutory function of disposing assets in repayment of non-performing loans by completing the sale of the land. Danaharta was therefore an aggrieved party within the meaning of the NLC. (para 3)

(4) Astron's submission that ss. 326 and 327 NLC should not be read separately and that Danaharta having failed in its application under s. 326 was estopped from seeking removal of the caveat under s. 327, if accepted, would bar the jurisdiction of the court. The right of recourse to the court could not be barred under any rule. The action of Danaharta in commencing this application was not an abuse of process of the court. (para 14)

(5) On the issue of the legality of the charge raised by the defendant to support the argument that it was a matter requiring mature consideration at trial and not to be decided in a summary way, the case of *Keet Gerald Francis Noel John v. Mohd Noor* was not a general authority for the proposition that every issue of legality when raised must necessarily be dealt with in a trial. That part of the decision to hold a trial was made not upon the issue of illegality alone but also upon consideration of other issues raised in that appeal. On disputes on facts appearing upon affidavits, see the case of *Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors* applying the *ratio decidendi* in *Eng Mee Yong & Ors v. Letchumanan*. (para 15)

(6) On Astron's submission that it was an interested party and had locus to challenge the legality of the charge, the question was whether Astron had a caveatable interest, having accepted that Danaharta was an aggrieved party. A caveator is bound by its statutory declaration set out in the caveat. As the argument of the illegality of the charge was not in its statutory declaration, Astron could not rely upon that ground in the proceedings. As such, it was not necessary to deal with the other grounds relating to the illegality of the charge. (paras 16 & 18)

(7) The said land was charged as security for a loan that had become non-performing before the advent of Astron. Astron's remedy was against the registered owner and not against Danaharta or its predecessor MBf whose rights as chargee was a right *ad rem* obtained earlier than the interest of Astron. The right of Astron to remedy was not an interest *ad rem*. The interest was monetary. It could not warrant a caveat. (para 19)

Case(s) referred to:

Affin Bank Bhd v. Dato' Mohamed Embong [2002] 1 CLJ 202 HC ***(refd)***

Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case [1995] 3 CLJ 639 CA ***(refd)***

Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad [1995] 4 CLJ 283 FC ***(refd)***

Chan Foo Meng & Ors v. Hup Seng Co Ltd [1987] 2 CLJ 430; [1987] CLJ (Rep) 523 HC ***(refd)***

Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd [2004] 1 CLJ 701 FC ***(refd)***

Eng Mee Yong & Ors v. Letchumanan [1979] 1 LNS 18 PC ***(refd)***

Franky Construction Sdn Bhd v. MEC Industrial Park Sdn Bhd [2002] 8 CLJ 279 HC ***(refd)***

Goh Paik Swan v. Ng Choo Lum [1997] 1 CLJ 77 CA ***(refd)***

Hew Sook Ying v. Hiw Tin Hee [1992] 3 CLJ 1325; [1992] 1 CLJ (Rep) 120 SC ***(refd)***

Keet Gerald Francis Noel John v. Mohd Noor & Ors [1995] 1 CLJ 293 CA ***(refd)***

Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd; Bhagat Singh Surain Singh & Ors (Interveners) [1996] 4 CLJ 52 HC ***(refd)***

Malayan Banking Bhd v. Chuah Chok Kiang [1997] 1 LNS 412 HC ***(refd)***

Malayan United Finance Bhd v. Tan Lay Soon [1991] 2 CLJ 899; [1991] 1 CLJ (Rep) 292 SC ***(refd)***

Mok Yong Kong & Anor v. Mok Yong Chuan [2002] 3 CLJ 615 CA ***(refd)***

Murugappa Chettiar Lakshmanan (Wasi Tunggal Harta Pesaka M.R.L. Murugappa Chettiar, Simati) v. Lee Teck Mook [1995] 2 CLJ 545 CA ***(refd)***

Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors [1998] 1 CLJ 793 FC ***(refd)***

Public Finance Berhad v. Jetfast Sdn Bhd [1995] 3 CLJ 243 HC ***(refd)***

Public Finance Bhd v. Narayanasamy [1971] 1 LNS 107 FC ***(refd)***

Repco Holdings Sdn Bhd & Ors v. Pengurusan Danaharta Nasional Bhd & Ors (No 2) [1999] 1 LNS 159 HC ***(refd)***

United Malayan Banking Corp Bhd v. Development & Commercial Bank Ltd Bhd [1983] 1 CLJ 82; [1983] CLJ (Rep) 421 ***(refd)***

Legislation referred to:

Federal Constitution, art. 13(1)

National Land Code, ss. 326, 327

Specific Relief Act 1950, s. 11(2)

For the plaintiff - S Selvaratnam (Alan Gomez & Michelle Lee with him); M/s Tommy Thomas

For the defendant - Tharminder Singh (KT Goh with him); M/s Logan Sabapathy & Co

Reported by Usha Thiagarajah

JUDGMENT

Abdul Wahab Patail J:

[1] The plaintiff, Pengurusan Danaharta Nasional Sdn Bhd (Danaharta), applied by this originating summons for the following orders against the defendant, Astron Limited (Astron):

i) That the private caveat (the caveat) entered by Astron upon H.S.(D) 8375, PT No 73 in Bandar Port Dickson (the land) be struck out under s. 327 National Land Code 1965;

ii) Such other remedies and orders as the court thinks fit; and

iii) Costs.

[2] The land was mortgaged by Port Dickson Land Development Sdn. Bhd. to MBf Finance Bhd to secure a RM19.6 million loan by latter to Sena Maju Sdn. Bhd. All rights to the charge were transferred to Danaharta as from 31 March 2000 free of encumbrances and claims. Danaharta demanded repayment from

Sena Maju Sdn. Bhd. and Port Dickson Land Development Sdn. Bhd. In default of repayment, Danaharta exercised its right under s. 57 to sell to a third party. It was found that Astron had filed a private caveat on 15 August 2001. Danaharta sought removal of the caveat by the Registrar of Titles (the Registrar) under s. 326 of the National Land Code. Astron, by an application in S5-22-218-1997 obtained an extension of two months to the caveat from 23 July 2002. Danaharta filed this application for removal/cancellation of the caveat.

[3] Astron is an Australian public company involved in the restructuring of the Safuan Group of Companies. As part of the exercise, several properties were bought, including the land in this case. Astron would inject RM10 million into Safuan Group. Part of that sum was to repay MBf. The restructuring failed. Astron had commenced civil proceedings for specific performance and declaratory relief against the Safuan Group, including performance of the sale of the land to Astron by way of a civil suit C5-22-218-1997.

[4] Thus, Astron is in an unenviable position of seeking to enforce transfer to it of property that is now taken over by Danaharta whilst its civil suit is continuing.

Submissions For The Defendant

[5] In pursuing its action Astron had filed an application for a further extension of its caveat. It was submitted the powers of the registrar was temporarily suspended pending hearing of the extension application. It was further submitted that ss. 326 and 327 of the National Land Code should not be read separately, and Danaharta having failed in its application under s. 326 is estopped from seeking removal of the caveat under s. 327 before the court. And in any case, it was submitted, the question of legality of the charge, raised by Astron, and citing *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad* [1995] 4 CLJ 283 FC, is a matter requiring mature consideration at trial and not to be decided in a summary way.

[6] In view of the fact the charge being challenged by Astron was entered into by Safuan and before Astron became the purchaser of the land, Astron submitted it is an interested party and has locus to challenge the legality of the charge. For this purpose it relied upon *Public Finance Bhd v. Narayanasamy* [1971]

A 1 LNS 107 FC. Recognising that its transaction with the Safuan Group was to purchase shareholding, it relied upon *Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors* [1998] 1 CLJ 793 FC; [1998] 1 MLJ 465 FC, 510 that although a mere shareholder cannot enter a caveat, in certain circumstances it could. It was B submitted for Astron that, relying on *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case* [1995] 3 CLJ 639 that there was ample justification to depart from the strict rule.

C **[7]** If illegality of the charge were established, it would apply to the charge *ab initio*, and MBf, and Danaharta would obtain no priority. It could not, also, be an aggrieved party. On this, Astron relied upon *Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd; Bhagat Singh Surain Singh & Ors (Interveners)* [1996] 4 D CLJ 52.

[8] Upon the ground that there was a prior caveat before Danaharta assumed its rights, there was no opportunity to challenge the issue of non-disclosure earlier, and Astron was E entitled to a trial to seek discovery in respect of the allegation of non-disclosure.

[9] It was also submitted that the action of Danaharta in effect took away the rights of Astron in contravention of the rights under art. 13(1) of the Federal Constitution.

F

[10] The closing argument for Astron was that in view of the action in C5-22-218-1997, there is a statutory presumption in favour of Astron under s. 11(2) of the Specific Relief Act 1950.

G **Findings And Grounds**

[11] It is observed that Danaharta is not and has not been made a party to the civil suit in C5-22-218-1997, which is an action by Astron subsequent to a failed restructuring exercise for Safuan Group. It is not for the plaintiff in that case to maintain H that Danaharta must apply to be a party in that action. In not naming Danaharta as a defendant, Astron conceded that Danaharta is not a relevant party in that action. In such an event, a party not named retains the right whether to apply to intervene in that action or to commence and maintain its own action I separately.

[12] The argument that Danaharta cannot be an aggrieved party because the charge was illegal *ab initio* is of no merit as it is circular reasoning to apply it to the status of Danaharta as a party when the argument concerns legality of the charge is a separate issue.

[13] The caveat by Astron prevents Danaharta from proceeding with its statutory function of disposing assets in repayment of non-performing loans by completing the sale of the land to Nostalgia Kenangan Sdn. Bhd. Danaharta is therefore an aggrieved party within the meaning of the National Land Code. Its statutory function was described in *Franky Construction Sdn Bhd v. MEC Industrial Park Sdn Bhd* [2002] 8 CLJ 279. It is, as the party currently holding a claim to the rights under the charge, a party who is seriously affected. See *United Malayan Banking Corp Bhd v. Development & Commercial Bank Ltd Bhd* [1983] 1 CLJ 82; [1983] CLJ (Rep) 421; *Public Finance Berhad v. Jetfast Sdn Bhd* [1995] 3 CLJ 243; *Malayan Banking Bhd v. Chuah Chok Kiang* [1997] 1 LNS 412; *Affin Bank Bhd v. Dato' Mohamed Embong* [2002] 1 CLJ 202.

[14] Nothing in the National Land Code supports the argument that ss. 326 and 327 of the National Land Code are mutually exclusive. Proceeding on to the ground of estoppel, it must be observed that estoppel is a rule of equity. However, the effect of the submission, if accepted, would bar the jurisdiction of the court. The right of recourse to the court cannot be barred under any rule. The action of Danaharta in commencing this application is, therefore, not an abuse of process.

[15] An issue of legality of the charge was raised by the defendant to support the argument that it is a matter requiring mature consideration at trial and not to be decided in a summary way. Legality, or more precisely illegality, is an issue that can arise in more than one way. If it is a matter of interpretation or construction of provisions in any law or terms of an agreement, it can be dealt with by submissions in a hearing if the facts relied upon are not disputed. Similarly, if the facts relied upon are disputed, but those disputed facts are conclusions or inferences from facts, ordinarily referred to as particulars, that are not disputed, then those inferences or conclusions of fact can be dealt with by submissions in a hearing. If the facts or particulars set out

in an action, in the affidavits in an action commenced by originating summons, or pleadings in an action commenced by a writ of summons, are not disputed, then there is no necessity to hold a trial for the sake of holding a trial or for a collateral purpose. *Keet Gerald Francis Noel John v. Mohd Noor & Ors* [1995] 1 CLJ 293 CA; [1995] 1 AMR 373 CA is not a general authority for the proposition that every issue of illegality when raised must necessarily be dealt with in a trial. That part of the decision to hold a trial was made not upon the issue of illegality alone, but took into consideration other issues raised and considered in that appeal. Indeed, even if there are disputes on facts appearing upon affidavits, the Supreme Court in *Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14), applying the *ratio decidendi* in *Eng Mee Yong & Ors. v. Letchumanan* [1979] 2 MLJ 212 PC; [1979] 1 LNS 18 said:

> Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbably in itself it may be.

[16] Proceeding then with the application, and having accepted that Danaharta is an aggrieved party, the question the court must consider is whether Astron has a caveatable interest. The onus is upon Astron to show that it has, and proceed to show there is a serious question to be tried and the balance of convenience lies in maintaining the caveat: *Eng Mee Yong & Ors v. Letchumanan*:

> This is the nature of the onus that lies upon the caveator in an application by the caveatee under s. 327 for removal of a caveat: he must first satisfy the court that on the evidence presented to it his claim to an interest in the property does raise a serious question to be tried; and, having done so, he must go on to show that on the balance of convenience it would be better to maintain the *status quo* until the trial of the action, by preventing the caveatee from disposing of his land to some third party.

[17] *United Malayan Banking Corp Bhd v. Development & Commercial Bank Ltd Bhd* [1983] 1 CLJ 82; [1983] CLJ (Rep) 421; *Goh Paik Swan v. Ng Choo Lum* [1997] 1 CLJ 77 expressed the same views.

[18] It is trite law that a caveator is bound by its statutory declaration set out in the caveat: *Mok Yong Kong & Anor v. Mok Yong Chuan* [2002] 3 CLJ 615; *Murugappa Chettiar Lakshmanan (Wasi Tunggal Harta Pesaka MRL Murugappa Chettiar; Simati) v. Lee Teck Mook [1995] 2 CLJ 545*, *Goh Phaik Swan v. Ng Choo Lum* [1997] 1 CLJ 77. The argument of illegality of the charge was not in the statutory declaration. Astron cannot rely upon this ground in this proceeding for the removal of caveat. It is not necessary to deal with the other grounds relating to the illegality of the charge.

[19] The land was charged as security for a loan that had become non-performing before the advent of Astron, and at the time of its entry into the purchase and as a party involved in restructuring, cannot be unaware of what non-performing loans might entail. That restructuring effort failed. Astron's remedy is against the registered owner and not against Danaharta or its predecessor MBf whose right as chargee is a right *ad rem* obtained earlier than the interest of Astron: *Malayan United Finance Bhd v. Tan Lay Soon* [1991] 2 CLJ 899; [1991] 1 CLJ (Rep) 292, *Public Finance Berhad v. Jetfast Sdn Bhd* [1995] 3 CLJ 243. The right of Astron to remedy is not an interest *ad rem*: *Hew Sook Ying v. Hiw Tin Hee* [1992] 3 CLJ 1325; [1992] 1 CLJ (Rep) 120, 198, *Chan Foo Meng & Ors v. Hup Seng Co Ltd* [1987] 2 CLJ 430; [1987] CLJ (Rep) 523. The interest is monetary: *Repco Holdings Sdn Bhd & Ors v. Pengurusan Danaharta Nasional Bhd & Ors (No 2)* [1999] 1 LNS 159. It cannot warrant a caveat.

[20] The issue on constitutionality has been dealt with by the Federal Court in *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd* [2004] 1 CLJ 701 FC. The Federal Court held the provision is not contrary to the Federal Constitution.

[21] For the reasons above the plaintiff's application was allowed with costs.